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COMMONWEALTH OF VIRGINIA, ex rel.

**NORTHERN VIRGINIA ELECTRIC COOPERATIVE,
Petitioner,**

v.

CASE NO. PUE010512

**VIRGINIA ELECTRIC AND POWER COMPANY
d/b/a DOMINION VIRGINIA POWER,
SMITHSONIAN INSTITUTION, AND U. S.
GENERAL SERVICES ADMINISTRATION,
Respondents.**

**For a Petition for Declaratory Judgment
and Motion for Injunction**

REPORT OF DEBORAH V. ELLENBERG, CHIEF HEARING EXAMINER

March 20, 2002

On September 17, 2001, Northern Virginia Electric Cooperative (“NOVEC” or “the Cooperative”) filed a Petition for Declaratory Judgment and Motion for Injunction. Therein, NOVEC petitions the Commission to declare that the proposed sale of electric energy by Virginia Electric and Power Company d/b/a Dominion Virginia Power (“Virginia Power”) to the Smithsonian Institution (“Smithsonian”) and/or the U.S. General Services Administration (“GSA”) for consumption at the Steven F. Udvar-Hazy Center, National Air and Space Museum (“the museum” or “the facility”) under construction in Fairfax County, Virginia, is within the service territory of NOVEC, and violates Virginia law and NOVEC’s property rights under its certificate of public convenience and necessity granted by the Commission pursuant to the Utility Facilities Act.¹ The Petition names Virginia Power, the Smithsonian, and the GSA as respondents.

The Cooperative asked the Commission to declare that: (i) Virginia Power has violated the Utility Facilities Act; (ii) the Smithsonian Project is within NOVEC’s certificated service territory; (iii) NOVEC is the proper provider of electric service to the Smithsonian and grant NOVEC the ability to provide electric service at the facility site; (iv) Virginia Power may not unreasonably deny a delivery point to ODEC on behalf of NOVEC and Virginia Power’s denial of the delivery point is not in the best interest of Virginia ratepayers and is not lawful; (v) any transactions or contracts between Virginia Power and the Smithsonian are unlawful under the Utility Facilities Act and therefore unenforceable or void; and (vi) any provision of service by Virginia Power in NOVEC’s certificated territory is in violation of NOVEC’s rights granted by the Commission in the certificate of public convenience and necessity issued to NOVEC.

¹Chapter 10.1 of Title 56 of the Code of Virginia.

NOVEC also petitions the Commission to temporarily and permanently enjoin Virginia Power from selling and delivering, directly or indirectly, any power or providing any service to the Smithsonian. NOVEC agreed to permit Virginia Power to construct facilities to provide temporary power to the facility during construction, but NOVEC asks the Commission to enjoin Virginia Power from the construction of any permanent infrastructure.² Thus, NOVEC seeks an injunction pendente lite to maintain the status quo while the Commission considers the evidence and rules on the merits of this dispute and the propriety of a permanent injunction.

On October 2, 2001, the Commission issued a Preliminary Order. Therein, the Commission assigned this matter to a Hearing Examiner, directed NOVEC and Virginia Power to file a joint stipulation of the facts and issues upon which they agree and also upon which they disagree, and scheduled an oral argument for October 25, 2001, on the request for an injunction pendente lite.

On October 12, 2001, Virginia Power filed an Answer denying that its sale of electricity to the Smithsonian violates Virginia law, and a Counter Petition seeking a declaration that it has the statutory and legal obligation to provide service to the entire Smithsonian facility. Virginia Power simultaneously filed a Memorandum in Opposition to the Motion for Injunction.

Also on October 12, 2001, the Smithsonian and the GSA, by counsel, accepted the Commission's invitation to offer comments on the matter in dispute.³ The Smithsonian addressed its practical concerns and support for Virginia Power to provide service to the new museum. It has contracted with Virginia Power to provide that service. In its Response, the Smithsonian expressed its concern that the phased construction schedule of the museum remain uncompromised. It asserts that only the timely completion of each phase of the project will ensure that the facility will open in December 2003, the centennial of the first powered flight by the Wright Brothers on December 17, 1903. That opening date is significant because: (1) many individual and corporate donors who provided funding expect completion of the museum by that anniversary date; (2) the project's time line for completion could be endangered by scheduling changes; and (3) the museum plans to take advantage of the unique educational opportunities associated with opening on the centennial of the Wright Brothers' first flight.

On October 16 and 18, 2001, NOVEC and Virginia Power filed a joint stipulation of facts upon which they could agree and to which they disagreed ("Joint Stipulation"). There remained questions of fact upon which the parties could not agree.

By Hearing Examiner's Ruling dated October 22, 2001, a Motion for Leave to Participate filed by Old Dominion Electric Cooperative ("ODEC") and the Association of Virginia, Maryland and Delaware Cooperatives (the "Association") was granted.

On October 24, 2001, NOVEC filed several affidavits. On October 25, 2001, before the scheduled oral argument, NOVEC also filed a pre-hearing memorandum.

²NOVEC Petition at 9-11; Transcript at 6-7.

³The GSA is the record landholder for the property on which the facility is being constructed. (Petition at 4). The United States' Response, however, noted that the GSA has played no role in the events that have led to the dispute in this case. (Response at 2, n.1).

At 10:00 a.m. on October 25, 2001, an oral argument was held on NOVEC's motion for injunction pendente lite. Appearances were entered by William Bradford Stallard, Esquire, and JoAnne L. Nolte, Esquire, on behalf of NOVEC; E. Duncan Getchell, Jr., Esquire, Kodwo Gharthey-Tagoe, Esquire, and John D. Sharer, Esquire, on behalf of Virginia Power; Steven E. Gordon, Assistant U. S. Attorney on behalf of the U.S. Government, Smithsonian, and the GSA; James P. Guy, II, Esquire, and John A. Pirko, Esquire, on behalf of ODEC and the Association; and Sherry H. Bridewell, Esquire, and Wayne N. Smith, Esquire, on behalf of Staff. Staff and the parties presented arguments in support of the positions taken in their filed pleadings, and on November 1, 2001, Staff and the parties filed post-hearing memoranda and several supplemental affidavits. A transcript of the oral argument is filed with this report.

On November 2, 2001, a ruling was entered to establish a procedural schedule for addressing the merits of the territorial dispute in this case. It was determined that such a schedule should be established because the time necessary to resolve this matter was of importance to all parties regardless of the action on the motion for an injunction pendente lite.

A ruling denying NOVEC's motion for an injunction pendente lite was subsequently issued on December 5, 2001. Therein, I found that:

1. Significant and irreparable harm to the Smithsonian, one of the respondents, could result from a delay in the scheduled opening of the new museum;
2. There are remedies available, albeit at some cost, to NOVEC if the Commission ultimately finds in its favor;
3. There is some likelihood that NOVEC will prevail, at least in part, based on the point of use test applied in the Prince George case, but there are significant differences in this case that make the outcome far less than certain;
4. Any likelihood of success does not offset the substantial and irreparable harm that could face the Smithsonian if a temporary injunction was granted; and
5. The public interest, educational opportunities, and the interests and expectations of the benefactors of the facility will be adversely affected if this new museum of undisputed national importance and reputation fails to open on the centennial anniversary of the Wright Brothers' historic first flight.

A public hearing to receive evidence on the merits of the Petition was subsequently convened on December 11, 2001, and continued on December 12, 2001. All counsel listed above again appeared in their representative capacities.

NOVEC presented the direct testimony of Gilbert D. Jaramillo, and the direct and rebuttal testimonies of Peter G. Moore and James C. Moxley. ODEC presented the testimony of Konstantinos N. Kappatos. Virginia Power offered the testimony of Rebecca H. Buchanan, Randall G. Trott, and Justin Estoque. Transcripts of the hearing are filed with this report. Simultaneous

post-hearing briefs were filed on January 31, 2002, and simultaneous reply briefs were filed on February 7, 2002.

SUMMARY OF THE RECORD

In the Joint Stipulation, NOVEC and Virginia Power agree that NOVEC is a Virginia electric distribution cooperative, that Virginia Power is a Virginia public service corporation, and that the Smithsonian was created by an Act of Congress to serve the public. They agree that the Smithsonian is constructing a National Air and Space Museum annex at Dulles Airport. They also stipulate that Virginia Power is currently providing temporary power to the facility. They independently recognize that the museum will have several points of electric usage including a hangar, an IMAX theatre, the main central utility plant, and four air handling unit areas that are interconnected as one complex, and a separate parking lot.⁴

The list of facts to which they disagree, or more specifically emphasized, is much longer. The evidence received at the hearing addresses the location of the facility; location of the service boundary lines; and the dealings and communications between NOVEC and Virginia Power, ODEC and Virginia Power, NOVEC and the Smithsonian, and Virginia Power and the Smithsonian. Testimony also addressed technical details involved in a transfer of service and particularly the length of time and details involved in a transfer of service in another relevant Commission case. Testimony was also received on whether ODEC on behalf of NOVEC was entitled to a delivery point and whether the Smithsonian construction schedule would be affected by a transfer of service.

NOVEC contends that all or virtually all of the buildings, or the “footprint” of the facility, and the bulk of the load to be consumed, will be located in its service territory. Peter Moore, a land surveyor engaged by NOVEC, testified that he had examined the parcel of land near Dulles Airport where the Smithsonian is constructing the new facility. He reviewed several maps, including the SCC map identified as “E51” which defines the relevant boundary lines between the service territories of NOVEC and Virginia Power.⁵ Mr. Moore also examined several drawings entitled “Map of Land Acquisition for Dulles International Airport,” the United States Geological Survey (“USGS”) Quadrangle, the preliminary construction plans prepared for the Smithsonian, and eventually a personal inspection of the facilities.⁶

He prepared a mylar of the footprint of the Smithsonian building and placed it over the map of the service boundary lines. He concluded that the boundary line transects the parcel of land on which the Smithsonian is constructing the facility, and that 95% of the structures are within NOVEC’s territory, but the parking lot is within Virginia Power’s territory.⁷ He also observed that there are limiting factors which preclude exact calculations, including both the quality and distortion of the documents reviewed, scale variables, and conversion factors. He notably identified the distortions in the copy of the E51 map which has a scale of 1 inch:24,000 feet. At that scale he

⁴NOVEC Petition Exhibit 2; Virginia Power Answer and Counter Petition at 6; Joint Stipulation at 2, 11-13; Transcript 368-369.

⁵Exhibit PGM-1, at 1.

⁶*Id.* at 1-2; Transcript at 144-154.

⁷Exhibit PGM-1, at 3, Attachment 2, and attached to this Report as Attachment 1.

testified that the width of the line on the E51 map itself is approximately 30 feet wide.⁸ However, he also testified that the effect of those factors on his calculation that 95% of the museum structures lie in NOVEC's territory would be no more than plus or minus five percent of the value.⁹

NOVEC next offered the testimony of James C. Moxley, senior vice president for electric and telecommunications systems development for NOVEC. His responsibilities include the long and short range planning for the cooperative's distribution system and for the design construction and maintenance of that system.¹⁰ He is also responsible for resolution of utility boundary issues and the related planning and placement of the utility facilities to serve customers. He testified that NOVEC began to work with the Smithsonian on or about August 6, 1996, to obtain specifications for the proposed facility.¹¹ He further testified that he has always maintained that the bulk of the Smithsonian's electric power usage was in NOVEC's certificated territory, and it was therefore the proper entity to provide service. He responded to charges that NOVEC has been dilatory by asserting that he followed the same procedure that he has with Virginia Power when similar boundary matters have arisen.

NOVEC further contends that it learned on or about January 25, 1999, that Virginia Power was also working with the Smithsonian.¹² On November 22, 2000, NOVEC, through ODEC, requested a new delivery point pursuant to the Network Operating Agreement Between Virginia Electric and Power Company and Old Dominion Electric Cooperative dated July 29, 1997 ("the NOA").¹³ In February 2001 NOVEC received a copy of a letter indicating that the Smithsonian and Virginia Power were close to reaching an agreement for electric service.¹⁴ The request for a delivery point was denied on April 6, 2001. According to NOVEC, its request was denied because the Smithsonian had requested service from Virginia Power.¹⁵

Mr. Moxley asserts that requests for delivery points with a voltage level less than 115 kV have not been problems in the past. Indeed, he testified that NOVEC has four other delivery points at 34.5 kV.¹⁶ Mr. Moxley also addressed the duct-bank configuration, stating that specifications for duct-banks carrying the service conductors do not vary much from one utility to another:¹⁷

The specifications that affect electrical performance are generally related to the design capacity of the electrical cable system, which dictate the size of the cable and of the conduit to be specified... There could be specific customer requirements, such as concrete-encased ductwork, that do not violate the [National Electric Safety Code] NESC standard, but may have an impact on some aspects of the duct-bank design to ensure adequate electrical performance.¹⁸

⁸Id. at 2.

⁹Id. at 3.

¹⁰Exhibit JCM-3, at 1.

¹¹Id. at 2; Joint Stipulation at 3.

¹²Id. at 6.

¹³Id.

¹⁴Exhibit JCM-3, at 3.

¹⁵Id. at 5.

¹⁶Exhibit JCM-3, at 5.

¹⁷Id. at 6.

¹⁸Id.

Mr. Moxley also admitted that NOVEC was aware that the Commonwealth of Virginia actually installed the duct-bank, but NOVEC never contacted it concerning specifications of the duct-bank.

[W]e anticipated that the Smithsonian, who knew NOVEC's position as the rightful electric service provider, would continue to provide NOVEC with updated information as they had in the earlier phases of the project.¹⁹

In the spring of 2001, NOVEC scheduled a meeting with the Commission Staff. In June and July 2001, in an effort to keep the Smithsonian construction project on schedule, NOVEC agreed to allow Virginia Power to provide temporary service.²⁰ Mr. Moxley contends that in August of 2001, it became clear that the two utilities could not reach a solution to the problem, and the present action was filed in September.²¹

NOVEC continues to maintain that it is willing and able to serve the Smithsonian facility, and that it has the exclusive duty and obligation to provide such service.²² Mr. Moxley testified that NOVEC "can meet the Smithsonian's construction schedule" but admitted that it would "need to have a delivery point...[and] [t]he transformer delivery schedule could cause delay to the full capacity service."²³ He contends that NOVEC could:

if needed, temporarily install available transformers of sufficient capacity to meet the most likely construction phase needs while the museum facility is still under construction and not in need of the full design capacity.²⁴

He described NOVEC's successful completion of a totally new substation and a transmission line extension to serve the America On-Line data center in Prince William County as an example of the Cooperative's ability to respond to an extremely ambitious schedule.²⁵

NOVEC's final direct witness was Gilbert D. Jaramillo, manager of account services for NOVEC. He testified that he initially worked with the Smithsonian on this project in August of 1996. In subsequent meetings that year he stated that NOVEC reaffirmed its intent and capability to serve the new facility.²⁶ He recognized that the Smithsonian would be a profitable and a popular customer to have, especially when the Smithsonian participates in the festivities surrounding the celebration of the Wright Brothers' first flight in North Carolina.²⁷

Mr. Jaramillo projected the Smithsonian's electrical requirements to be approximately 6.25 MW at a load factor of 62%.²⁸ He contends that if the Commission allows Virginia Power to serve this customer NOVEC will be unable to plan for the future in any meaningful way, and fixed costs

¹⁹Id. at 7.

²⁰Id. at 3.

²¹Id. at 3.

²²Id. at 4.

²³Id. at 4.

²⁴Id.

²⁵Id.

²⁶Exhibit GDJ-4, at 2.

²⁷Id.

²⁸Id. at 3.

would be adversely impacted and increase costs for remaining customers. He argues that such a result would render certificates meaningless and any utility could bypass another “by ...using an extension cord that is long enough to traverse the incumbent’s service territory.”²⁹ Mr. Jaramillo also asserts that “NOVEC is more than capable of stepping into the shoes of Dominion and servicing this customer at the appropriate time.”³⁰

Konstantinos N. Kappatos, senior vice president of engineering and operations at ODEC, testified next. He discussed ODEC’s role in procuring new delivery points for its member cooperatives, and the typical resolution process for contested requests. He also addressed ODEC’s request for a delivery point to serve the Smithsonian project.³¹ He verified that requests for delivery points are governed by the NOA. Mr. Kappatos asserts that once a request for a delivery point is submitted to Virginia Power, it “has little discretion but to grant it, subject to considerations of technical utility practices and [ODEC’s] agreement to cost allocation.”³² He testified that ODEC first began discussions with Virginia Power regarding a new delivery point to serve the Smithsonian facility in August of 1997.³³ He confirmed that a request for a new delivery point had been submitted to, and denied by, Virginia Power.³⁴ He also stated that service to this customer at a lower distribution voltage was not unusual, dictated by good utility practice, and recommended by Virginia Power in early planning meetings.³⁵ He testified that ODEC has rejected Virginia Power’s denial of its delivery point request.³⁶ Mr. Kappatos acknowledged that they “may need [Federal Energy Regulatory Commission] FERC [intervention] to resolve the question of whether Virginia Power has any right to ‘deny’ a delivery point request,”³⁷ but he contends that the delivery point issue probably will be quickly resolved by the parties once the Commission decides which utility has the statutory right to serve the customer.

Virginia Power asserts that the majority of the Smithsonian’s property lies in its service territory and that all buildings that constitute the museum are wholly or partially in its territory. Virginia Power offered the testimony of Rebecca H. Buchanan, manager customer contracts-distribution operations products and services for Virginia Power. She testified that there are unique facts in this case that should lead the Commission to permit Virginia Power to serve the Smithsonian, including:

1. The customer’s property straddles the boundary line and all or a portion of the load associated with each point of use is in. . .[Virginia Power’s] territory.
2. The Smithsonian has demonstrated a clear preference for Dominion Virginia Power to be the provider of a normal electric service and an alternate electric service.

²⁹Id.

³⁰Id. at 5.

³¹Exhibit KNK-5.

³²Id. at 3.

³³Id. at 6.

³⁴Id.

³⁵Id. at 7-8.

³⁶Id.

³⁷Id. at 11.

3. Effectively, Dominion Virginia Power is the electric distribution provider with or without NOVEC's involvement.
4. Dominion Virginia Power has planned to serve this load and stands ready to provide electric service in accordance with the customer's request.
5. NOVEC has demonstrated no ability, absent a delivery point from Dominion Virginia Power, to provide electric service in accordance with the customer's requirements.
6. It would be wasteful and imprudent for two utilities to serve a single customer's property.³⁸

Ms. Buchanan asserts that Virginia Power is effectively the distribution provider because there would be little difference in Virginia Power's investment and responsibility to the customer no matter which utility is found to be the distribution provider, as NOVEC would require a delivery point from Virginia Power to serve the customer.³⁹ She also contends that the Smithsonian has requested normal and alternate service which Virginia Power can provide and NOVEC has not addressed. The alternate service has been requested because the Smithsonian will have a low tolerance for outages and it would provide another supply of electricity should the normal service become unavailable.⁴⁰ She further testified that Virginia Power has clearly stated its intent to NOVEC. In a letter dated January 25, 1999, and in several subsequent written documents, Virginia Power advised NOVEC that it intended to provide service to the Smithsonian.⁴¹

Ms. Buchanan also testified that the Smithsonian has expressed its preference that Virginia Power serve its facility. Indeed, she observed that the Smithsonian has already constructed the duct-bank and transformer pads in Virginia Power's territory.⁴²

She also notes that Virginia Power has done all of the planning, made provisions to accommodate the additional load on its distribution system, and will have constructed, owned and maintained the distribution line extension so that if NOVEC is found to be the appropriate provider, it will reap significant benefit but will have incurred little effort or investment.⁴³

Virginia Power next presented the testimony of Justin Estoque, project manager for the construction of the Steven F. Udvar-Hazy Center, National Air and Space Museum in Dulles, Virginia. Although presented as a Virginia Power witness, the initial direct examination of Mr. Estoque was conducted by counsel for the Smithsonian.⁴⁴ Mr. Estoque testified about the nature, purpose, and time sensitivity of the construction schedule of the new facility. The new facility is being constructed to, among other things, prevent further deterioration of one of the world's most

³⁸Exhibit RHB-9, at 2-3.

³⁹*Id.* at 3.

⁴⁰*Id.* at 4-6.

⁴¹*Id.* at 5.

⁴²*Id.* at 8-9.

⁴³*Id.* at 11.

⁴⁴Transcript at 327.

valuable and irreplaceable collections of aviation and space flight artifacts. In addition to large public exhibits, the facility will provide a restoration area. The facility is scheduled to open in December of 2003, in celebration of the centennial of the first powered flight by the Wright Brothers on December 17, 1903.⁴⁵ Thus, the December 2003, opening will allow the Smithsonian to take advantage of unique educational opportunities associated with the centennial and also reflects the expectation of many of the individual and corporate donors who have provided funding for the facility.⁴⁶ Mr. Estoque contends that switching to NOVEC at this stage could endanger the scheduled opening of the facility. He asserts that significant planning has been completed and related infrastructure has been installed in accordance with Virginia Power requirements. To permit construction and start-up of mechanical and electrical equipment necessary for construction to continue on the current schedule, the Smithsonian's construction contractor must have permanent power available by the beginning of April 2002.⁴⁷ Mr. Estoque confirmed that Virginia Power has already sized its transformers for the Smithsonian load, and the concrete pads for the transformers have been designed and located in accordance with Virginia Power's requirements. The duct-bank which will carry the service conductors has also been installed in accordance with Virginia Power specifications, notably, located on Virginia Power's side of the territorial boundary.⁴⁸ Mr. Estoque expressed his concern that if another utility provider replaced Virginia Power, the new provider at a minimum would have to confirm the calculations, and may need to resize the transformers, redesign and relocate pads and the duct-bank, thus resulting in time-consuming and costly changes.⁴⁹

Virginia Power finally presented the testimony of Randall G. Trott, a Virginia licensed land surveyor. He testified that more of the facility being built by the Smithsonian was in Virginia Power's territory than contended by NOVEC. He asserts that the IMAX theatre will be almost entirely within Virginia Power's territory.⁵⁰ Mr. Trott also prepared a map showing the proposed Smithsonian facilities in relation to the service boundaries.⁵¹ Mr. Trott located the southern end of the western boundary line of the relevant portion of NOVEC's service territory (the portion nearest the Smithsonian building) and the northern end of that same line.⁵² He had more trouble locating the eastern boundary. He used global positioning equipment to locate certain relevant points, and downloaded the located points into his computer using several software packages including the Geographic Information System ("GIS"), an industry standard program.⁵³ He then scanned Map E51 into the program which allowed him to digitize the end points or corners of the relevant service area boundary line "with a high degree of accuracy."⁵⁴ He used another software program to digitize the Smithsonian building footprint from the construction plans located at the Smithsonian site engineer's office. His map therefore depicts the relationship between the eastern line of the service area and the building footprint.

⁴⁵Exhibit JE-10, at 1-2.

⁴⁶Id. at 3.

⁴⁷Id. at 4.

⁴⁸Id. at 5.

⁴⁹Id.

⁵⁰Exhibit RGT-14, at 1.

⁵¹Id. at 2, Attachment B and attached hereto as Attachment 2.

⁵²Id. at 3.

⁵³Id.

⁵⁴Id.

NOVEC presented the rebuttal testimony of Messrs. Moxley and Moore. Mr. Moore defended his approach to determining the boundary lines against the criticisms lodged by Virginia Power witness Trott.⁵⁵ He emphasized that the quality and distortion of the relevant documents affect the location of the exact line; however, he notes that he started with established, published control points.

Mr. Moxley took issue with Virginia Power's charge that NOVEC had been dilatory in filing this action. In response to Ms. Buchanan's contention that Virginia Power would "effectively be the distribution provider" even if the Commission found that NOVEC was entitled to serve the Smithsonian, Mr. Moxley explained that NOVEC serves all of its customers, ultimately from the Virginia Power transmission grid. Most delivery points are served at either 115kV or 230kV but some delivery points are operated at the wholesale delivery voltage level of 34.5kV.⁵⁶ He also stated that NOVEC can provide the Smithsonian with an alternate source of delivery once it receives the necessary specifications.

DISCUSSION

Virginia Power and the Smithsonian first argue that NOVEC has been dilatory in bringing this action and therefore should not be allowed to prevail. NOVEC's own testimony supports the contention that NOVEC has been in contact with the Smithsonian on this project since 1996.⁵⁷ Yet NOVEC has taken no significant steps to provide service to the Smithsonian other than to request a delivery point from Virginia Power in November of 2000. NOVEC has also known that Virginia Power intended to serve this customer at least since January of 1999, and that Virginia Power and the Smithsonian have taken substantial steps to arrange such service. Yet, NOVEC did not bring this action before the Commission until September of 2001.

NOVEC counters that the Smithsonian and Virginia Power have known that it, NOVEC, has asserted its exclusive right to serve this customer all along. Apparently, NOVEC thought if it continued to say it had the exclusive right to serve the Smithsonian, Virginia Power and the Smithsonian might acquiesce.

Virginia Power, however, has similarly ignored the reality of this dispute. It apparently thought that if it contracted with the customer first, and proceeded to construct facilities to provide service, it could validate its own right to provide service. Virginia Power completely disregarded NOVEC's territorial boundary line despite clear knowledge that NOVEC also claimed a right to legally serve the customer, and thus a boundary dispute existed.

⁵⁵Exhibit PGM-19.

⁵⁶Exhibit JCM-20, at 2.

⁵⁷Exhibit JCM-3, at 2.

Neither utility took definitive and timely steps to resolve this disagreement. Both knew of the other's intent to provide service to the customer, and both ignored their competitor's assertion. Either utility could have, and should have, brought an action before the Commission in a timely fashion in the interest of most fully protecting the customer from undue risk. Despite the utilities' failure to bring this action to the Commission sooner, it is in the best interest of the customer for the Commission to now resolve this dispute expeditiously on its merits.

In that regard, NOVEC argues that Commission precedent requires application of a point of use test to decide this territorial boundary dispute, and that the practical factual circumstances of this matter favor it. The Cooperative asserts that it is the rightful utility to provide service to the entire Smithsonian facility because 95% of the facility lies within NOVEC's certificated territory. NOVEC also contends that Virginia Power and the Smithsonian have manipulated the delivery point so that the customer can take receipt of its power in Virginia Power's territory. NOVEC avers that it relies upon its right to provide service to the customers within its certificated territory in its short- and long-term planning. Mr. Moxley testified that NOVEC has a number of non-contiguous areas or islands in its service territory that are surrounded completely by Virginia Power territory. He testified that "we have a lot of shoreline in that case, so we have a lot of boundary, in effect at risk"⁵⁸ if Virginia Power is allowed to prevail in this case. Finally, NOVEC argues that Virginia Power's failure to provide a delivery point to NOVEC should play no role in the decision in this case, and that an orderly transfer of service can be effected if the Commission finds in its favor. NOVEC contends that Virginia Power urges the Commission to adopt an exception to the point of use test that would "swallow the rule"⁵⁹ and would not provide strong protection for utilities' service territories.

ODEC supports NOVEC's argument and also urges the Commission to find that NOVEC has the exclusive right to serve this customer. It too argues that a decision in Virginia Power's favor would undermine the grant of exclusive territories.

Virginia Power argues that it is within its legal right to serve the Smithsonian, and indeed, it is under a legal obligation to serve a customer in its territory that requests service. Virginia Power further contends that it should have the exclusive right to serve any points of use solely within its service territory, and an equal right to serve any points of use partially in its territory. Virginia Power emphasizes that a large portion of the property is located within its service territory, that all facilities are located wholly or partly within its service territory, and that it proposes to deliver electricity to the museum from within its own service territory. It contends that customer choice should prevail to avoid the impracticality of two providers serving one building. Virginia Power witness Buchanan also argued that both the practicalities and a point of delivery test should be considered under the unique facts of this case. She believed it was important to weigh the reality that the Smithsonian has already installed the duct-bank and the transformer pads in Virginia Power's service territory.⁶⁰

⁵⁸Transcript 522.

⁵⁹January 31, 2002, NOVEC Brief at 25.

⁶⁰Exhibit RHB-9, at 8.

The Smithsonian wants Virginia Power to serve its power needs. It recognizes that part of its building will be in NOVEC's territory but also contends that since part of its property and facilities are in Virginia Power's territory it should be allowed to choose its provider. Moreover, it argues that the duct-bank has been installed to accommodate Virginia Power specifications and is already in place. The Smithsonian fears that the practical reality is that delays in its construction schedule and ultimately in its facility opening could result if it was required to switch providers now.

Statutory Framework

Virginia Power argues that under Virginia Code § 56-234 it has a duty to provide service to the Smithsonian because the Smithsonian has requested service. Virginia Code § 56-234 does provide that "[i]t shall be the duty of every public utility to furnish reasonably adequate service and facilities at reasonable and just rates to any person, firm or corporation along its lines desiring same." Clearly it is relevant to the pending dispute. That Code section, however, must be read in conjunction with Code §§ 56-265.3 and 56-265.4. The Utility Facilities Act⁶¹ provides the framework for granting certificates authorizing utilities to provide exclusive utility service in specified territories. A certificate of public convenience and necessity also has been found to be a valuable property right entitled to the protection of the courts.⁶²

Virginia Code § 56-265.3 prohibits a utility from providing service unless it has first obtained a certificate to provide service in a particular service territory. Virginia Code § 56-265.4 prohibits a utility from providing service to a facility in another utility's service territory unless it has proven to the satisfaction of the Commission that the original holder is not capable of providing adequate service, and then only after the other utility is given a reasonable time and opportunity to remedy its inadequacy. Section 56-265.4 thus provides the requisite standard that must be established before the Commission can issue a certificate authorizing a utility to provide service in another's territory.⁶³ The Virginia Code thereby grants utilities the right and obligation to provide service within, and only within, the territory granted exclusively to them. Such a statutory framework avoids unnecessary duplication of facilities and economic waste where multiple providers might otherwise be in a position to serve the same customer.

The record is clear that the property on which the Smithsonian proposes to construct its museum, and more importantly, the facility or point of use itself is bisected by the boundary line dividing the service territories allotted to Virginia Power and NOVEC without customer manipulation.⁶⁴ This customer's use does not fall exclusively in either utility's territory, but rather its point of use falls to widely differing degrees in both. This case, however, does not present a factual situation unique to the utilities involved. Despite their unwillingness to agree on even the clearest and most basic facts in this case, NOVEC, Virginia Power, and ODEC independently recounted that territorial boundary realignments have historically been handled with mutual and

⁶¹Virginia Code § 56-265.1 *et seq.*

⁶²*Town of Culpeper v. VEPCO*, 215 Va. 189 (1974).

⁶³Neither Virginia Power nor NOVEC have asked the Commission to revoke the other's certificate under this Code section.

⁶⁴Transcript 145, 175.

cooperative consideration of what was best for the customer when boundary lines bisected a customer's property and facilities. Many considerations have gone into such informal resolutions of territorial boundary disputes in the past including, but not limited to, proximity of the distribution provider to the facilities to be served, other recent or contemporaneous exchanges of territories, and recent additions to a utility's service territory.⁶⁵ Mr. Moxley testified:

[W]e try to accommodate each other by redrawing the line in some fashion so that it's not through a building. . . .

[T]he methods that we've historically used. . . [if] the line actually runs through that building, we . . . take the approach that... whoever has most of the building is the one who gets the load.

. . . we make an accommodation in one instance where NOVEC takes the building here and there is a small portion that Virginia Power would theoretically have, then we might make an accommodation on the other property. . . by redrawing the line along another street so that there's some equity involved in that process.⁶⁶

It is unfortunate that such a similar amicable solution could not have been worked out in this case long before now. It is hoped that competition will ultimately be good for the public, but it appears that, in this case, competition over the customer has ended a long-standing practice of utilities working cordially together to provide the best and most reliable service available to the customer. To the contrary, all three utilities in this case preferred to risk timely delivery of electric service to a nationally critical customer with time sensitive deadlines.

Commission Precedent

Since utilities have generally cooperatively handled boundary issues, the Commission has formally addressed very few territorial disputes. Two cases, however, are particularly relevant to the dispute now before the Commission. Indeed all parties to this case begin their argument with reference to the Commission precedent established in *Prince George Electric Cooperative for declaratory judgment and Petition of RGC (USA) Mineral Sands, Inc. and RGC (USA) Minerals, Inc. for a declaratory judgment*, Case No. PUE960295, 1998 S.C.C. Ann. Rep. 344 ("Prince George case") and *Petition of Kentucky Utilities Company*, Case No. PUE960303, 1999 S.C.C. Ann. Rep. 368 ("Kentucky Utilities case").

In the first case, a new customer, RGC (USA) Mineral Sands Inc. ("RGC") began construction of a mineral processing plant on a parcel of land located wholly within the service territory of Prince George Electric Cooperative ("Prince George"). RGC desired service from Virginia Power, not Prince George. The customer purchased a narrow strip of land that was 4,380 feet by 30 feet and that extended into Virginia Power's allotted territory. That purchase represented only .4% of the total property. Virginia Power delivered the power to RGC within its territory and

⁶⁵Transcript at 185, 187.

⁶⁶Transcript 185.

the power was delivered through the customer's privately owned distribution system up the corridor to the point of use, but no points of use were in Virginia Power's territory. After considering the facts of that case and other cases discussing and comparing a point of use test with a point of delivery test, the Commission found that a point of use test would best ensure and maintain the integrity of service territories. The Commission concluded that a point of delivery test would destroy the essence of exclusive service territories. It would allow customers through manipulation of delivery points, to avoid receiving service from the utility allotted the territory in which the customer was located. The Commission opined that a utility could then be left with an obligation to serve its entire territory but with no assurance that it would be allowed to do so. Such uncertainty could result in growing difficulties as utilities attempted to plan and serve remaining customers, a situation which could result in increased costs for both the utility and its remaining ratepayers.⁶⁷ The Commission thus concluded that the point of delivery test was not consistent with the protection afforded certificated service territories by Virginia law. The Commission found that it was bound to decide the case "in a manner that is consistent with, and effectuates, the policy established by the General Assembly of ensuring and maintaining the integrity of service territories embodied in the Utility Facilities Act."⁶⁸ The Commission therefore adopted the point of use analysis, but also concluded that it should not adopt an absolute test. The Commission concluded that:

While we do not here adopt any absolute test and will always consider the practical realities of each situation, we intend to ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia.⁶⁹

The Commission reiterated that position in the *Kentucky Utilities* case observing that "[a]s discussed in *Prince George*, however, we must decide cases involving service territory disputes in a way that is consistent with the significant protection that is afforded to territorial grants by Virginia law."⁷⁰

The *Kentucky Utilities* case involved Sigmon Coal Company, Inc. ("Sigmon"), an existing customer, Kentucky Utilities Company ("KU"), and Powell Valley Electric Cooperative ("PVEC"). The boundary between the two utilities ran in a "V" shape with KU's territory in and north of the "V" and PVEC's territory immediately south of the "V". The Sigmon mining operations were located on properties covering approximately 13,120 acres on both sides of the boundary. From 1985 to 1992, KU exclusively served the mining operations in Lee County from a substation that served no load other than Sigmon's mining operations. PVEC also provided service to Sigmon to two mines in its area. At the time of the case before the Commission, one of those mines was completely shut down; the other mine was idle but electricity was required for running fans and pumping water. In 1992 Sigmon decided to build a new plant to be located in KU's service territory. PVEC proposed to serve all of Sigmon's power requirements, including those in KU's service territory, from a single consolidated delivery point that would be located in PVEC's territory immediately south of the PVEC/KU boundary. When the plant was built, however, Sigmon began

⁶⁷ *Prince George* case at 348.

⁶⁸ *Id.* at 349.

⁶⁹ *Id.*

⁷⁰ *Kentucky Utilities* case at 376.

taking service from KU while PVEC was completing a private distribution system. Within the same month Sigmon switched its service to PVEC.

The Commission concluded that the facts in the *Kentucky Utilities* case weighed even more strongly against allowing a customer to switch providers through manipulating its delivery point than was the case in *Prince George*. In the *Kentucky Utilities* case, the customer had been served by KU for a number of years, and its migration would have idled a dedicated substation and other facilities. The Commission concluded that if the customer had been “allowed to avoid its electric provider based on manipulation of its delivery point, the protection and certainty that the Utility Facilities Act was designed to provide to territorial grants would be diminished, if not significantly eroded.”⁷¹

A third test, the geographic load center test, is relevant to the case now before the Commission, and was discussed in a Colorado case addressing similar issues.⁷² Under that type of test, the utility that serves the majority of a customer’s load is generally designated as the provider for the entire load regardless of territorial boundaries. In the *Colorado PSC* case, the Colorado Supreme Court upheld a decision by the Colorado Public Utility Commission (“PUC”) to apply a point of use test to a territorial dispute. Indeed, this Commission cited the *Colorado PSC* case with approval in the *Prince George* case. The Colorado customer had buildings that were physically connected but straddled the territorial boundaries of two utilities. It also had facilities that were separate. The customer wanted one utility to serve all of its load, but the utility that the customer did not choose petitioned the PUC to enforce its right to serve the facilities that were located exclusively in its territory. It, however, did not seek a finding on service to the facility that straddled the territorial boundary. The Commission applied a point of use test to find that the petitioning utility had the right to serve the separate facility located solely in its territory. The Colorado Supreme Court affirmed the PUC decision, but also discussed the geographic load center test.

[O]nce the PUC has determined that the point at which electricity is delivered is not determinative, the focus shifts to the point at which electricity is consumed. As a general rule, the PUC may elect to apply either the point of use test or the geographic load center test in order to determine which utility should serve a particular facility. However, where, as here, the electricity is used at a facility located solely within a utility’s exclusive area; the facility is not physically interconnected with a facility outside the exclusive territory; and the facility was previously served by the utility in whose area it is located; the doctrine of regulated monopoly requires that the point of use test be applied to protect the rights of the certificated utility against encroachment.

... The PUC may, in the future, conclude that the point at which electricity is delivered should be the focal point in determining the legality of a utility’s action. We have also not held that the geographic load center test may never be used. We express no opinion as to the appropriate test where a single facility straddles two service areas, where separate yet interconnected facilities

⁷¹ *Kentucky Utilities* case at 376.

⁷² *Public Service Company v. Public Utility Commission*, 765 P.2d 1015, 1019 (Colorado 1988) (“*Colorado PSC* case”).

are situated within two service areas, or where a previously unserved facility requires electrical service. The PUC, in its discretion, may decide that the geographic load center test would be appropriate in these situations.⁷³

Strict application of the point of use test in the case now before the Commission would result in Virginia Power and NOVEC each serving only the points of use or the facilities located within their respective service territories. The main hangar and the heating and cooling equipment⁷⁴ lie wholly in NOVEC's service territory. The front door to the main facility and at least a portion of the IMAX theatre⁷⁵ which is physically connected to the hangar appear to be in Virginia Power's territory. The parking lot which stands physically apart from the main facility lies exclusively in Virginia Power's territory.⁷⁶ All parties to this case and Staff, however, assert that a literal application of the point of use test is not practical given the circumstances of this case.

Indeed, none of the parties to this case believe that service by two providers would be desirable. In its brief, Virginia Power asserts that:

[w]hile the Museum facilities straddle Dominion Virginia Power's and NOVEC's service territories, it would not serve the public interest in an orderly utility system to require both Virginia Dominion Power and NOVEC to serve the portions of the Museum located in their territories. Such service would be wasteful and inefficient.⁷⁷

NOVEC's counsel also observed that having two service providers would be impractical.⁷⁸ The Smithsonian does not want to be served by two providers.⁷⁹ Mr. Estoque asserts that the provision of service by two utilities would be inefficient.⁸⁰

Certainly, the Utility Facilities Act is intended to prevent economic waste and the public inconvenience resulting from duplication of utilities' facilities.⁸¹ In this case, dual metering, multiple bills from two providers, and dual electric service lines are examples of the type of economic waste and public inconvenience the Utility Facilities Act intended to avoid. The Commission therefore must balance the goal of protecting exclusive service territories with the Utility Facilities Act's objective of preventing economic waste and public inconvenience in this case. In finding that balance the Commission exercises considerable discretion. Indeed, as in the *Colorado PSC* case discussed above, this Commission has the discretion to conclude what test or tests best preserve the integrity of our system of exclusive service territories.

⁷³Id. at 1022.

⁷⁴February 7, 2002, NOVEC Brief at 1-2.

⁷⁵Although Virginia Power's witness asserts that the large majority of the IMAX theatre is in Virginia Power's territory, both location witnesses concur that there is a significant margin for error. Moreover, all of the heating and air conditioning equipment for the facility is without question located well within NOVEC's territory. (Transcript 367-369).

⁷⁶Transcript 354-357, 359, 366-369.

⁷⁷January 31, 2002, Virginia Power Brief at 24.

⁷⁸Transcript at 114-115.

⁷⁹Exhibit JE-10, at 3; Transcript 373.

⁸⁰Id.

⁸¹*Earl S. Tyson and Betty B. Tyson v. Central Virginia Electric Cooperative*, Case No. PUE800002, 1980 S.C.C. Ann. Rep. 283 (May 29, 1980).

Practical Realities

All parties argue that the Commission should apply the finding in the *Prince George* case, that the “practical realities” of each situation should be considered. They, however, differ on what “practical realities” are relevant in this case.

NOVEC places emphasis on the majority of the facility being located in its service territory. Indeed, although the Commission did not favor or reject a geographic load center test in the *Prince George* and *Kentucky Utilities* cases, NOVEC appears to urge the Commission to consider that test in this case. NOVEC places less emphasis on its failure to yet acquire, or pursue action at FERC to acquire, a delivery point from Virginia Power. NOVEC did not provide any detailed analysis of how the infrastructure (notably, the duct-bank which was installed in April of 2001, well before this action was even filed) already in place could be utilized by NOVEC to provide service without causing any delay in the critically important construction schedule.

ODEC also emphasizes the location of the majority of the facility, and would ignore any delay that might result from a determination that NOVEC should provide service. To ODEC, preservation of the integrity of exclusive territorial boundaries is more important than assuring timely service to a nationally celebrated customer that must open its new facility by December 2003.

Virginia Power asks the Commission to discount the fact that the overwhelming majority of use will be in NOVEC’s territory, and contends that if **any** of a customer’s point of use is in two utilities’ service areas, the customer should be allowed to choose its retail provider. Virginia Power also argues that it should be allowed to serve the customer in part because the reality is that its facilities to serve the customer are already in place in Virginia Power’s service territory. Virginia Power asserts that the practical reality of transferring service to NOVEC would be difficult, costly, time consuming and cause significant delays. Apparently Virginia Power believes that since it has facilities in place to serve the customer, whether lawfully or not, it should prevail. Virginia Power also refused to provide a delivery point to NOVEC to enable it to serve the customer, and then contends that another practical reality in this case is that NOVEC does not have a delivery point to serve the customer.

The Smithsonian expressed its preference for Virginia Power and its fear that its construction project would suffer delay if the Commission determined service should be transferred to NOVEC. It contends that Virginia Power should be allowed to serve the facility because it is already positioned to provide timely service.

As this case proceeded, the record was fully developed, and legal arguments proffered, it became clear that very relevant similarities exist between this case and the *Colorado PSC* case. Very significantly, the overwhelming principal point of use, according to all witnesses’ testimonies is in NOVEC’s territory. The majority of the structure will be the hangar which is in NOVEC’s territory. All the heating and cooling equipment for the museum will be in NOVEC’s territory. Future developments are planned in NOVEC’s territory. Only the building entrance, a portion of the IMAX theatre and the parking lot are in Virginia Power’s territory.

Moreover, although the customer did not manipulate its property boundaries to reach the distributor of its choice, Virginia Power did manipulate the location of its delivery equipment to accommodate delivery, not at the point of use, but at a point of delivery in its territory. Virginia Power's transformers and meter are on its side of the boundary, as they should be, and thus the point of delivery, as in the *Prince George* and the *Kentucky Utilities* cases, is in Virginia Power's territory. Virginia Power acknowledged that the transformers were located specifically to be placed within its own service territory.⁸² Mr. Estoque testified that the duct-bank was purposely designed to receive power at a point of delivery from Virginia Power in its service territory, and then go underground for approximately ¼ of a mile through NOVEC's service territory to the museum.⁸³ Mr. Estoque testified that such a configuration was designed "since we were expecting Virginia Power to provide power for us, that we would make sure that the pads, transformer pads and other parts of the infrastructure were completely within their service territory and according to their requirements."⁸⁴ Upon cross-examination, Mr. Estoque testified that he "[did not] know any other reason why they couldn't have been closer."⁸⁵ The transformers "could be fairly close to the south end of the building from an architectural - aesthetic point of view and an engineering point of view. . . ."⁸⁶

Further, although customer choice is on the regulatory horizon it will not result in the complete exclusion of the certificated distributor. The *Colorado PSC* case addressed the customer's right, or more specifically, lack thereof, to choose its distributor. In that case, the customer and the utility that wanted to serve all of the customer's electric load argued, as does Virginia Power, that:

[W]here a customer's property is located within two exclusive service territories, the customer should be permitted to choose the utility from which it will receive electricity.⁸⁷

The Colorado Supreme Court responded by finding that:

While we sympathize with the difficult position in which Morning Fresh has found itself, the policy behind the doctrine of regulated monopoly does not permit a customer to pick and choose between utilities. The doctrine of regulated monopoly is designed to protect the interests of the public as a whole, by preventing competition and inefficient duplication of services. The doctrine was not designed to protect the needs of the individual consumer. We have already stated that 'allowing customers to pick and choose from whom they will obtain any public utility service obviously creates rather than prevents duplication, fosters rather than controls competition, and totally disregards the principle that inadequacy of existing facilities must be shown in order to authorize a new service.' (citations omitted).⁸⁸

⁸²Transcript at 299.

⁸³Transcript 300, 347, 356-58.

⁸⁴Transcript at 357.

⁸⁵Transcript 358.

⁸⁶Id.

⁸⁷*Colorado PSC* case at 1024.

⁸⁸Id.

I find that the practical realities of this case support the conclusion that when a facility straddles the boundary, a geographic load test center should be applied as was discussed in the *Colorado PSC* case, and NOVEC should be afforded the exclusive right to serve the principal Smithsonian museum facility.

Without question, the parking lot lighting is a point of use exclusively in Virginia Power's territory, and if Virginia Power desires to serve the parking lot it is entitled to do so under a point of use analysis. The *Colorado PSC* case discussed the reasonableness of applying more than one test to a boundary dispute with similarly located facilities. The geographic load center test should be applied when a physically interconnected facility straddles the boundary. Here, however, the customer and Virginia Power have expressed their strong opinion that it would be unreasonable for two utilities to serve the Smithsonian. Virginia Power certainly could agree to swap territory with NOVEC so that NOVEC can serve the parking lot.

I continue to be concerned with the practical reality that this customer must receive timely and reliable electric service. As I observed in the December 5, 2001, ruling denying an injunction pendente lite, the Smithsonian was created by an Act of Congress. Congress granted a charter to it in 1877 as an "establishment. . .for the increase and diffusion of knowledge among men. . . ." ⁸⁹ The new facility will be available to serve the public in that endeavor. It is clearly in the public interest for the facility to open and to open on time to celebrate the centennial of the Wright Brothers' first powered flight. Time is critical as the facility's opening in December 2003 is scheduled to coincide with the centennial anniversary of the Wright Brothers' historic flight. Since this customer is a public institution of renowned fame, the public welfare demands timely service.

The Smithsonian project manager testified that he had "concerns" that if NOVEC were determined to be the service provider, the Cooperative might be unable to provide service in a timely manner to allow the museum to open on the centennial of the Wright Brothers' first flight. ⁹⁰ He "feared" that the planning ground work and infrastructure for the provision of electric service might have to be reconsidered and rebuilt according to a different provider's requirement. ⁹¹ He feared that the consequences to the Smithsonian of having to rework the infrastructure could delay the opening date, cause a missed unique opportunity to celebrate the centennial of flight, result in monetary penalties from contractor claims associated with the delay, and cause a further loss of confidence in the project by donors. ⁹²

Virginia Power opined that any transfer would be difficult, costly, and impose significant delays. Virginia Power witness Buchanan provided two diagrams that graphically represent possible delivery facilities with Virginia Power serving the customer and with NOVEC providing service. ⁹³ Ms. Buchanan clarified that NOVEC has not determined its facility configuration if it is found to be the appropriate distribution utility, but her representation depicts one possible scenario and demonstrates the delivery facilities' relationship to the territorial boundary and the Smithsonian facilities. Virginia Power and the Smithsonian apparently assume that the duct-bank would have to

⁸⁹20 U.S.C. § 41.

⁹⁰Transcript at 344-345.

⁹¹Transcript at 371-372, 375-376; Exhibit JE-10, at 5.

⁹²Exhibit JE-10, at 4-6, Transcript 347.

⁹³Exhibit RHB-9, at 8, Attachments B & C, and also attached hereto as Attachments 3 & 4.

be removed, a new one constructed, and new transformer pads poured only yards away from the work now in place at significant costs and with inevitable delay. Such a scenario, however, is only one transfer option.

In his oral argument opposing a preliminary injunction, Virginia Power's counsel assured the Hearing Examiner that a remedy similar to that fashioned in the *Prince George* case would be workable in this case if a preliminary injunction was not issued, Virginia Power proceeded to install facilities to provide permanent service, and the Commission ultimately found NOVEC to be the appropriate distribution provider.⁹⁴ At the December hearing, however, he argued that a transfer would be very difficult and very different from the transfer effected in the *Prince George* case.⁹⁵

In the *Prince George* case, the Commission directed Virginia Power and Prince George, in consultation with the customer, to prepare and submit to the Staff a detailed plan on how and when the Cooperative would begin providing service.⁹⁶ The physical facilities already in place were transferred to Prince George, and Virginia Power witness Payne testified that "the facilities were complete and in service, and it was essentially a paper transfer."⁹⁷ In addition, Prince George chief executive officer, Dale Bradshaw, testified that "it was agreed upon by the parties that we would use the existing Virginia Power metering point."⁹⁸ The transfer in that case did not result in any interruption to service.⁹⁹

NOVEC's witness Moxley testified that NOVEC has not been afforded an opportunity to review the specifications for the Smithsonian project, would need a delivery point to provide timely service, and further admitted that the transformer delivery schedule might introduce delay into the provision of full capacity electric service to the museum.¹⁰⁰

Mr. Moxley however later testified that NOVEC can meet the Smithsonian's construction schedule, can provide service in a timely and satisfactory manner, and is technically competent to provide service at the level required by the Smithsonian. On cross-examination he advised that a transfer could be completed:

Q: Okay. Could you state for the record what additional types of information you believe NOVEC needs in order to provide these specifications to the Smithsonian.

A: I will tell you, Ms. Bridewell, I'm not sure how much more, if anything, we really need. I think we know that the duct – or the conduit itself is a six-inch conduit. The transformers, the size, I believe, has been confirmed as 3750 kVA transformers. We have seen photographs from the Smithsonian's own Website,

⁹⁴Transcript 82-84.

⁹⁵I therefore requested Virginia Power to produce a witness who could discuss the mechanics of the transfer in the *Prince George* case. Virginia Power counsel reluctantly produced the witness but continued to argue that the *Prince George* case was factually distinguished. (Transcript 384-386, 393).

⁹⁶*Prince George* case at 349.

⁹⁷Transcript at 404.

⁹⁸Transcript at 423.

⁹⁹Transcript 409-10.

¹⁰⁰Exhibit JCM-3, at 4, 6-7, Transcript at 178, 180-181.

in fact, of ductbank cross-sections, and so we know how that – what that layout looks like now. . .¹⁰¹

Q: Mr. Moxley, can you comment at all about the transfer of service and any problems you would see with effecting such a transfer?

A: I see none. Again, based on what, what I've heard in this – over the past two days here, the information we had received prior to this, technical information, I see that this is going to be a very seamless, smooth transfer.

Q: Do you believe that if such a transfer was ordered by this Commission that it would impact at all the construction schedule for the Smithsonian?

A: Absolutely not.¹⁰²

He further observed that no one has suggested NOVEC is incapable of serving the customer.¹⁰³ Mr. Moxley continued to assert that NOVEC was willing, committed and able to serve the museum, and the transfer of service would be seamless and would not interfere with the construction schedule of the Smithsonian.¹⁰⁴

I find there appears to be no obstacle to a transfer of service, facilities and meters in this case similar to that ordered in the *Prince George* case; therefore, a transfer if ordered by the Commission is not likely to have a negative effect on the construction schedule for delivery of service.

Moreover, Virginia Code § 56-249.1 allows the Commission to:

require a public utility to transfer to another public utility of like business...electricity, whenever the public health, welfare or safety shall be found to so require; provided, however, that the transferring public utility shall be compensated, at a rate fixed by the Commission, for all such deliveries by the receiving public utility.

I therefore recommend the Commission direct Virginia Power to continue to deliver electricity to the Smithsonian by transferring the electricity to NOVEC at the existing point of delivery to the Smithsonian pursuant to § 56-249.1 until such time as Virginia Power and NOVEC can make the necessary facilities transfers and boundary realignments.¹⁰⁵ Reasonable compensation, of course, should be provided to Virginia Power for this additional accommodation. Although I must also

¹⁰¹Transcript 528.

¹⁰²Transcript 524.

¹⁰³Exhibit JCM-3, at 4, 7.

¹⁰⁴Transcript 524.

¹⁰⁵If the utilities are interested in the best interests of the customer, it would appear to me to be more reasonable to transfer the existing facilities to NOVEC, leave the duct-bank intact, and simply agree to shift the territorial boundary 200 feet south from its existing location. Utilities often negotiate boundary realignments. Although I recognize the boundary would be moved away from an existing natural marker it would assure the preservation of the construction schedule for the new facility.

warn NOVEC that this accommodation in the interest of public welfare can not continue for long. All parties agreed that time is of the essence; therefore, I also will recommend that NOVEC, ODEC and Virginia Power file regular progress reports.

I also recognize that Virginia Power has incurred substantial expense to provide service to the Smithsonian. In the *Kentucky Utilities* case the Commission also recognized that PVEC had invested large amounts of monies into serving the facilities at issue and a decision in favor of KU would have a deleterious financial impact on PVEC. The Commission concluded that it “must decide cases involving service territory disputes in a way that is consistent with the significant protection that is afforded to territorial grants by Virginia law.”¹⁰⁶ Similarly, in the *Colorado PSC* case the Court found that the customer:

...was aware that construction of its system was attended with risk, and it engaged in such activity with full knowledge of the possible consequences. We faced a similar question in *Western Colorado Power Co. v. Public Utilities Comm’n*, 159 Colo. 262, 285, 411 P.2d 785, 797 (1966), where we stated: The court is aware that the Hayden Plant is now constructed. This fact, however, cannot subvert the legal principles upon which our decision is based nor be allowed to defeat the doctrine of regulated monopoly to which Colorado subscribes. It is clear that [the parties] recognized that construction of the Hayden Plant during litigation was attended with substantial risk, and they engaged in such activity with full knowledge of the possible consequences.¹⁰⁷

This case is no different.

FINDINGS AND RECOMMENDATIONS

In conclusion, based on the evidence received in this case and for the reasons set forth above, I find that the combination of a point of use and geographic load center analysis should be considered to resolve the territorial dispute under the facts presented in this case. I further find that:

1) NOVEC has the right and the obligation to provide electric service to the new Smithsonian museum facility including the hangar, the main central utility plant, four air handling unit areas, and the IMAX theatre; and

2) Virginia Power has the right and obligation to provide service to the parking lot unless it transfers that territory to NOVEC.

¹⁰⁶ *Kentucky Utilities* case at 376.

¹⁰⁷ *Colorado PSC* case at 1025.

In accordance with the above findings, ***I RECOMMEND*** the Commission enter an order that:

- 1) ***ADOPTS*** the findings in this Report;
- 2) ***GRANTS*** the petition of NOVEC for declaratory judgment insofar as the Commission determines that NOVEC has the exclusive right and obligation to serve the main facility;
- 3) ***DENIES*** the counter petition of Virginia Power for declaratory judgment;
- 4) ***DIRECTS*** Virginia Power, ODEC, and NOVEC, in consultation with the Smithsonian, to submit a plan detailing how and when NOVEC will begin providing service to the Smithsonian to be submitted to the Commission within 30 days of the date of a final order;
- 5) ***ENJOINS*** NOVEC, ODEC and Virginia Power to work cooperatively to accommodate a timely and efficient transfer of service;
- 6) ***DIRECTS*** NOVEC, ODEC and Virginia Power to file a joint report of progress bimonthly until the transfer is complete; and
- 7) ***DISMISSES*** this case from the Commission's docket of active proceedings after the transfer of service is complete, and passes the papers herein to the file for ended causes.

COMMENTS

The parties are advised that any comments (Section 12.1-31 of the Code of Virginia and 5 VAC 5-20-120 C) to this Report must be filed with the Clerk of the Commission in writing, in an original and fifteen (15) copies, within seven (7) business days from the date hereof. The mailing address to which any such filing must be sent is Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Any party filing such comments shall attach a certificate to the foot of such document certifying that copies have been mailed or delivered to all counsel of record and any such party not represented by counsel.

Deborah V. Ellenberg
Chief Hearing Examiner